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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1950

NO......

PINKNEY HESTER ICENHOUR,

Petitioner and Appellant below,

VS.

UNITED STATES OF AMERICA, **Respondent and Appellee below,**

Petition for Writ of Certiorari to the United States .Circuit Court of Appeals for the Fifth Circuit.

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, PINKNEY HESTER ICENHOUR, respectfully shows:

I.

STATEMENT OF MATTER INVOLVED

Petitioner was indicted in the Augusta Division of the United States Court for the Southern District of Georgia, along with William Frederick Icenhour, George Ray Icenhour and Cliatt F. Morris, jointly charging each defendant: (R-2,3,4,5)

(1) Having in his possession and custody, and under his control, an unregistered distillery (Sec. 2810 I. R. C.);

(2) Carrying on the business of a distiller without giving the required bond (Sec. 2833 I. R. C.);

(3) Carrying on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him (Sec. 2833a, I. R. C.);

(4) Working at said distillery whereupon the required sign "Registered Distillery" had not been posted (Sec. 2831, I.R.C.);

(5) Possession of a quantity of non-tax-paid distilled spirits (Sec. 2803a, I. R. C.);
to which all defendants pleaded not guilty. (R-5).

The trial jury found appellant and William Frederick Icenhour guilty on all counts save Count Four; defendant Cliatt F. Morris guilty of Count Four only (R.5).

Motion for acquittal was made by the Government in behalf of defendant, George Ray Icenhour. (R-56).

When the Government announced "We rest" (R.55) Mr. Stevens, Attorney for appellant, rose to make a motion for acquittal and the following transpired:

"Mr. Stephens: I would like to make a motion. (R.55).

The Court: I will let the jury go out. I don't have any objections to them hearing it. Do you have a motion you say? (R.55).

Mr. Stephens: Yes sir, there is no testimony connecting either one of the defendants with this still and the making of liquor. (R.55).

Mr. Morton: We would like for the jury to retire.

The Court: All right, go to your room, gentlemen.

The Court: (Out of the presence of the jury) Under a decision I have in mind you have got to prove that they did specific work at the still, and Judge Sibley said you had to prove they worked at the still before conviction would stand.

Arguments by counsel on both sides.

The Court: Well, I am going to let the case go to the jury." (R-55-56).

Appellant, Pinkney Hester Icenhour, appealed his conviction to the Circuit Court of Appeals for the Fifth Circuit and his appeal was heard by Circuit Judges Hutchinson, Holmes and Russell and affirmed. (Opinion R. 67-68).

The judgment affirming the lower court was entered in the Circuit Court of Appeals on the 16th. day of Oct., 1950. (R. 68)

On March 31, 1949 at approximately three a'clock in the afternoon six officers of the law were searching for a still about five miles from Appling, Georgia in Columbia County. They came upon a road that lead off of a public road and ran through Cliatt Morris' yard and within twenty-five yards of his house that went down back of his house and had fresh automobile tracks and foot tracks in it. They followed that road down until they came in sight of a still that was in full operation about seventy-five yards from them. They saw four or five men moving around in the still yard. The officers watched the still while it was in full operation and the four or five men moving around the still yard for about five minutes. They identified as being in the still yard and moving about the still Cliatt Morris, William Frederick Icenhour and Pinkney Hester Icenhour but could not identify the other two men; these two men got away. The road the officers were following was the only road to the still. While the officers were watching the still, Cliatt Morris walked out in the direction of the officers and three of the officers went to arrest him. The other officers raided the still. The men at the still started running. William Frederick Icenhour was caught by one of the officers and Pinkney Hester Icenhour by one of the officers and each of them brought back into the still yard. One of the officers drove into the still yard with a 1939 Dodge pickup truck and had with him Cliatt Morris. When the said William was brought into the still yard he did not have any shoes on and was in his stocking feet. He inquired "Where is my shoes?" There was a pair of shoes lying within four feet of the still and one of the officers picked them up and said to William: "Here they are" and William put them on. Another officer picked up an army jacket on a barrel in the still yard and said William said: "That is mine" and he put

the Army jacket on. The officers with their prisoners then returned to Cliatt Morris' yard; returning by the same road they came down. William Icenhour inquired if he could drive home a 1941 Chevrolet car that was parked near the back steps of Cliatt Morris' house and said he had the keys to the car. William Icenhour was the son of Pinkney Hester Icenhour. (R. 52). Said William asked the officers if he could drive his truck home and when asked if he had the keys he said he did. The officer seized the truck, which was the same 1939 Dodge truck that the officer had driven into the still yard above referred to and said William gave Mr. Finley, one of the officers, the key to the truck. (R-41). The road the officers went down started at the main road and ran into and through the yard of Cliatt Morris and down into the woods. It was a regular road that vehicles could travel and there was no obstructions to the main entrance of it or in it. (R-14, 15). The distillery was approximately a 75 gallon distillery and approximately five hundred yards back of Cliatt Morris' house in some woods back there and at an old spring. The Growth was reasonably thick. There were some big trees and bushes and thick growth around the spring. (R-27). One of the officers testified "I would say about 100 yards or maybe 200 yards from his house, (referring to Cliatt Morris' house) I saw Pinkney Icenhour's truck, recognized it as his, parked on the still road. (R-24). "It had nothing in it to indicate that it had been used in connection with that distillery. Nothing but tires of the truck, the tire tracks from the truck had come in the still yard several times". (R-33)

William Frederick Icenhour and Pinkney Hester Icenhour lived five or six miles from the still yard. (R-52).

Officer Charlie Tudor testified: "I saw Morris come around the still and stop in front of the distilery where whiskey was coming out and change jugs and

looked directly towards us. Then he walked off towards us and he changed his course and went to the right". (R-38).

None of the officers were able to testify as to anything that William Frederick Icenhour or Pinkney Hester Icenhour were doing, nor any special work that either one of them did, however, the following officers used expressions, to-wit:

Officer George Finley: "The still was in full operation and we saw four men working around the still." (R-12). However, he testified in connection therewith "They were moving around the still yard, engaged in various activities" but he did not see anything that anyone did. They may have been moving around the distillery simply for the purpose of taking a drink for all he knew. (R-18).

Officer P. A. Crawford: "I definitely did say I recognized Cliatt Morris, Pinkney Hester Icenhour and William Frederick Icenhour. I positively identified them working around the still and the two brothers got away". (R-24).

The Court inquired of this witness as to the expression "working" as follows:

The Court: Mr. Witness what definite work did you see P. H. Icenhour doing".

The Witness: I would say he was there in the bunch. I could see them squatting around there.

The Court: What definite work did you see Pinkney Hester Icenhour doing?

The Witness: I couldn't swear what he had in his hand, but he was at the furnace. I couldn't swear just

what he had in his hand, but I took for granted—

The Court: Not that — but could you swear he did any definite work at the still?

The Witness: No sir.

The Court: Could you swear that Cliatt Morris did any definite work?

The Witness: No, Sir.

The Court: Could you swear that William Frederick Icenhour did any work at the still?

The Witness: No Sir.

The Court: You saw all of them moving around the still yard was all?

The Witness: Yes, sir.
(R-34-35).

Officer Charlie Tudor: "I could not say, of course, just what any particular one was doing. I saw them working around the still". (R-43).

The Court as to the expression "working" asked the following question of this witness: Just tell me what specific work you saw Pinkney Icenhour doing?

The Witness: Judge, I didn't recognize him off that distance, but I saw a man about his size under the still.

The Court: Who was it?

The Witness: I couldn't say.

The Court: What did you see William Frederick Icen-

hour doing? What specific work did you see him doing?

The Witness: The same way with the old gentlemen, I couldn't tell.

The Court: Tell what specific work you saw him doing around the still?

The Witness: I couldn't recognize either one from that distance.

The Court: How about Morris?

The Witness: I did recognize Morris.

The Court: What did you see him doing?

The Witness: He came around in front of the still and changed buckets that they were catching whiskey in and then he stood up.

The Court: All I want to find out is what specific work you saw him doing? Did you see him put any wood under the fire?

The Witness: No, sir.

The Court: Did you see him do anything about the liquor?

The Witness: That was all I could swear I saw him do. (R-44,45).

This witness testified: "I saw them firing the still". (R-47).

The Court as to this expression inquired of the witness and commented as follows:

The Court: What?

The Witness: Putting wood under the still, firing it.

Q. How soon after you saw them putting wood under the distillery before you saw any of the defendants?

A. Well—

The Court: (Interposing). Which one of the defendants did you see putting wood under the fire?

The Witness: I couldn't say.

The Court: Well, you can't identify people like that. I can't let a case like this go to the jury. The Circuit Court of Appeals have held that you have got to prove they were working at the still. I don't seen any use wasting time if you can't prove that any one or or all of them were actually doing some work at the still. If you can prove that any one of the defendants did any work I will let it go to the jury on that. I don't see where you have introduced any evidence whatever that either one of the defendants were actually working at the still. (R-47-48).

Petitioner respectfully contends:

(1) The verdict of the jury and the judgment of the trial court finding him guilty of counts one, two, three and five are wholly unsupported by any evidence and his coviction on each of said counts respectively is wholly unsupported by any evidence. (R, pp 11-55, both inclusive).

(2) The judgment of the Circuit Court of Appeals affirming appellant's conviction is error and should be reversed. (R-67-68).

(3) The only evidence as to appelant having any connection with the still or the liquor is the fact that he was seen in the still yard while the still was in operation, in which yard was the seven gallons of untaxed liquor, and that he fled from the still yard when the officers raided and that, therefore, the evidence against him was wholly circumstantial and insufficient to exclude every other reasonable hypothesis save that of guilt of the accused of (1) Unlawfully possessing a still; (2) carrying on the business of a distiller without giving bond; (3) carrying on that business with intent to defraud the United States of tax; and (4) possessing distilled spirits in containers not having tax paid stamps affixed.

II.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13th, 1925 (Section 347, Title 28 U.S. C.A.).

On the 13th day of Nov., 1950, within thirty days from the entry of said judgment this petition for a writ of certiorari is filed.

III.

QUESTIONS PRESENTED

(1) The Circuit Court of Appeals in its judgment of affirmance said: "The fact the defendant failed to move for an instructed verdict". This recital was erroneous. The fact is that as a matter of substance appellant's counsel did move for an instructed verdict of acquital, however, such motion was defective in form and technically deficient in phraseology. (R-55). The court disregarded substance and attached too much im-

portance to form and technical deficiency. Such technical deficiency and form should not deprive appellant of the demands of justice that a judment against appellant based on no evidence be reversed.

(2) There is no evidence that the accused committed the crime or any one of them charged against him, and while the crimes charged was committed the evidence does not establish, as a matter of law, that appellant committed the crimes or any one of them.

(3) Each of the four offenses charged against appellant is a separate offense under the statutes. To prove either of the four offenses it was necessary for the Government to establish each offense by evidence pointing directly to the conduct of appellant within the narrow margin which the statute defines in each instance. There is a complete absence of any evidence that appellant did engage in the conduct specifically prohibited by the statutes or aided or abetted such coduct and, therefore, as a matter of law, he is not guilty of any of the crimes charged against him.

(4) As a matter of law the Government's evidence and testimony only raises a suspicion of guilt of appellant. This suspicion is based only upon the presence of appellant at the still and his flight. There is no evidence to even remotely connect the appellant with possessing the still or of carrying on the business of distilling or attempting to defraud the Government or of possessing liquor.

(5) A conclusion testified to by a witness, such as the conclusion of "working", testified to by three Government witnesses in this case (R-12,18,24,34,35,43,44 and 45), should, as a matter of law, be disregarded as evidence where the witnesses grounded such conclusion on no facts known to him or proven by him, and such conclusion is in direct conflict with facts testified to by

him that show positively and admittedly by the witneses when questioned by the trial Judge that the conclusion drawn was based on no facts known to him.

IV.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

(1) The Circuit Court of Appeals for the Fifth Circuit committed error in not recognizing that a motion for acquital was in substance made by appellant's counsel and holding to the contrary that as a fact no such motion was made. (R-55).

(2) The Circuit Court of Appeals for the Fifth Circuit committed error in affirming the judment of conviction of appellant on each and every count, in that justice required a reversal of the judgment for the reason that the evidence was insufficient to support the conviction of appellant on any one of the counts.

(3) The Circuit Court of Appeals for the Fifth Circuit committed error in not reversing the judgment convicting the appellant on each of said counts for the reason it was its duty to reverse the judgment, even though it be conceded for argument purposes that no motion for an instructed verdict of acquital was made, in that there is not sufficient evidence to support a conviction on any one of said counts.

WHEREFORE, your petitioner prays that a Writ of Certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit in this case numbered and entitled on its docket as follows: No. 13051,

Pinkney Hester Icenhour, Appellant vs. United States of America, Appellee, to the end that said case may be reviewed and determined by this court and the said judgment of said Court of Appeals be reversed and set aside by this court. Dated this 1st. day of November, 1950.

PINKNEY HESTER ICENHOUR

BY BENJAMIN E. PIERCE, SR.

BY W. D. LANIER

Attorneys for Appellant

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION OF COURT BELOW.

The opinion of the Circuit Court of Appeals for the Fifth Circuit appears in full in the record. (R.67-68). Said case has not been reported in the advance sheets of the Federal Reporter, 2nd. Series as yet.

II.

JURISDICTION

The jurisdictional statement will be found in the petition for Writ of Certiorari and is incorported here by reference.

III.

STATEMENT OF CASE

So far as is material to the questions here presented the statement of the case will be found in the petition for Writ of Certiorari under "Statement of Matter Involved" and is incorporated here by reference.

IV.

SPECIFICATIONS OF ERROR

(1) The Circuit Court of Appeals for Fifth Circuit erred in holding the conviction of petitioner should be affirmed.

(2) The Circuit Court of Appeals for the Fifth Circuit committed error in affirming the judgment of conviction of appellant on each and every count, in that justice required a reversal of the judgment for the reason that the evidence was insufficient to support the con-

viction of appellant on any one of the counts.

(3) The Circuit Court of Appeals for the Fifth Circuit committed error in not reversing the judgment convicting the appellant on each of said counts for the reason it was its duty to reverse the judment, even though it be conceded for argument purposes, that no motion for an instructed verdict of acquital was made, in that there is not sufficient evidence to support a conviction on any one of said counts.

V.

ARGUMENT

APPELLANT'S CONVICTION ON ANY OF THE FOUR COUNTS WAS WHOLLY UNSUPPORTED BY ANY EVIDENCE AND MANIFESTLY UNJUST AND SHOULD HAVE BEEN REVERSED.

(a) The testimony of each of the Government's witnesses Finley (R-18), and Crawford (R-31, 34, 35), and Tudor (R-43,44,45) that appellant was "working" at the still was not in either instance supported by sufficient facts to give it probative value. The mere opinion or conclusion of a non-expert, without more, is without probative value. 23 C. J. Secundum, Page 114. Ashley vs State, 97 S.E. 82, 27 Ga. App. 626. State vs. Carricut, 102 Southern 98, 157 La. 140. The conclusion of an ordinary witness cannot supply lack of evidence of such acts and conduct as are necessary to constitute the crime charged. 23 C. J. Secundum, page 114. Schwyhart vs. U.S. C.C A. Ark, 82 F. 2d 725, McLaughlin vs. U.S. C.C.A. Pa. 26 F. 2d 1.; Hicks vs. State, 128 So. 115, 22 Ala. App. 507; King vs. State, 136 S.E. 466, 36 Ga. App. 272; Miller vs. State, 128 S.E. 588, 34 Ga. App. 140.; Stromberg vs. Judge of Court of Common Pleas of Camden County, 193 A. 540, 118 N.J.

Law 387; People vs. Laude, 143 N.Y.S. 156, 81 Misc. 256; Belief of witness is insufficient basis of verdict, Boutcher vs. State, 95 So. 561, 19 Ala. App. 134; Use of mail is not sufficiently shown by opinions. Mackett vs. U.S.C.C.A. Wis. 90 F. 2d 462. Passley vs. State, 8 S.E. (2) 131, 62 Ga. Appeals 88; Murray vs. State 39 S.E. 2nd. 842, 201 Ga. 201. Under the rules of law above cited the conclusions by each of the witnesses have no probative value but in addition thereto the opinion of each of these witnesses was in conflict with the facts he testified to upon which he based his conclusion and, therefore, even the conclusion, if it were acceptable as a matter of law, was proved erroneous.

> "The belief of a witness cannot supply the place of substantive material facts". Griffin vs. State, 2nd. Ga. App. 534.

There remains then in the case as the only evidence to connect, even remotely, the appellant with the crimes committed his presence at the still and flight.

(b) Evidence which merely raised suspicion that all men on premises when officers entered possessed unregistered still there, but which did not distinguish one from another in respect of ownership was insufficient to sustain conviction for possessing an unregistered still. U.S. vs. De Vito C.C.A. N.Y. 1934, 68 Fed. 2nd. 837. The presence of defendants while the distillery was in operation is merely a circumstance to show their connection with it and will not alone justify a conviction. U.S. vs. Dobbs, D.C. Miss. 1871, Fed. Case No. 13,972. Reavis vs. U.S. C.C.A., Okla. 1938, 93 F. 2nd. 307. Evidence that a defendant was at or near an illicit still will not in itself justify a conviction. Grunwald vs. U.S. C.C.A. N.J. 1938, 94 F. 2nd. 952. Certiorari denied, 58 S. Ct. 830. 303 U.S. 663. Flight or attempted flight of accused before arrest, taken alone, does not raise a legal presumption of guilt. 22 C. J.

Secundum, par. 598, page 915. Cannon vs. U.S. C.C. A.S.D., 66F. 2d 13.; People vs. Herbert, 196 N.E. 821, 361 Ill. 64; State vs. Rodriguez, 147 F. 426, 23 N.M. L.R.A. 1918 A. 1916.; State vs. Payne, 197 S.E. 573, 213 N. C. 713; Edinger vs. State, 12 Ohio, App. 263; Jenkins vs. Commonwealth, 111 S.E. 101, 132 Va. 692, 25; A.L.R. 882.

Quoting from Seay vs. State, 63 Ga. App. page 289, the Court said:

"At one time in our judicial history flight resulted in the forfeiture of the goods of the accused, and raised a conclusive presumption of guilt. Flight is now held relevant merely as a circumstance tending to establis guilt, not in itself conclusive, nor can it create a legal presumption of guilt. 2 Wharton's Crim. Ev. 1831, § 950. 'When a suspected person attempts to escape or evade a threatened prosecution, it may be urged that he does so from a conscientiousness of guilt; and though this inference is by no means strong enough by itself to warrant a conviction, yet it may become one of a series of circumstances from which guilt may be inferred.' Id. 1494, §750. 'A person, however conscious of innocence, might not have the courage to stand a trial; but might, although innocent, think it necessary to consult his safety by flight.' Id. 1496, §750."

"Mere presence or flight to avoid arrest, both together, is not inconsistent with innocence."

2nd. Ga. App. 536, Griffin vs. State, Former Chief Justice Russell, speaking for the Court.

"'Proof of flight alone was not incriminatory circumstances of sufficient probative value of itself to authorize conviction of crime."

Smith vs. State, 16 App. at 293.

And in this case at page 294, the court said:

"The circumstances are certainly suspicious, and it may be conjectured that the defendant was guilty but a conviction based on conjecture alone cannot be allowed to stand no matter how often separate juries may surmise the guilt of the defendant."

(c) Each of the offenses charged against appellant was a seperate offense. Sec. 2810, I.R.C.; Sec. 2833, I.R.C., Sec. 2833 (a) I.R.C.; Sec. 2803(a) I.R.C. There is no evidence that the accused committed the crime or any one of them charged against him. While the crimes charged were committed, the evidence does not establish that appellant committed the crimes or any one of them. "Corpus deliciti must be established beyond a reasonable doubt." 23 C. J. Secundum, par. 917, page 186, and citations thereunder, including U.S. vs. Reavis, 93 F. 2d. 307.

"The circumstances relied on to establish the corpus deliciti must be more than enough to raise a mere conjection or suspicion." 23 C. J. Secundum, par. 917, page 186 and citations thereunder.

> "The essential element of the crimes cannot be presumed or left to inference or conjecture and to justify a conviction evidence must establish each essential element of the offense charged." 23 C. J. Secundum, par. 918, at page 187, and citations thereunder, including Boatright vs. U.S. 105 F. 2nd. 737.
>
> "The testimony to prove either of the charged offenses must point directly to the conduct within the narrow margin which the statute defines and one who neither engages in the conduct specifically prohibited nor aids nor abets it does not violate the statutes".
>
> Bozza vs. U.S. 330 U.S. 160, 67 S. Ct. 645.

The jur yfound the defendant not guilty of working at the distillery and it being determined by a jury he was not guilty of working at the distillery, certainly this court will disregard the conclusions of the three Government witnesses above referred to of appellant "working" at the distillery. He being found not guilty of working at the distillery leaves nothing to remotely connect him with the still or with the crimes committed, except his presence and flight.

(d) There is not sufficient evidence to support the conviction of appellant on any one of the four counts herein at issue and error is apparent, therefore, it became the duty of the Circuit Court of Appeals to reverse the judgment of conviction and it erred in not doing so. Wibory vs. U.S. 163, U.S. 632. 16 S. Ct. 1127, 1197; Hemphill vs. U.S. 312 U.S. 657, 61 S. Ct. 729; Sherwin vs. U.S. 312 U.S: 654, 61 S. Ct. 618; Sheridan vs. U.S. 312 U.S. 654, 61 S. Ct. 619.

It is most respectfully submitted, therefore, that this case is one calling for the exercise of this court's power of supervision by granting the Writ of Certiorari and reviewing and reversing the decision of the Honorable United States Circuit Court of Appeals for the Fifth Circuit.

Respectfully Submitted:

.....

BENJAMIN E. PIERCE, SR.

.....

W. D. LANIER

ATTORNEYS FOR APPELLANT

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